TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 168.

EDWARD HARRIS, ISAAC H. SHIMER, LATITIA SHIMER, PLAINTIFFS IN ERROR,

vs.

JOHN McGOVERN, FRANCIS R. BABY, AND CHARLES E. McLANE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 29, 1876.

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a UNITED STATES OF AMERICA, *ss:*

To John McGovern, Francis R. Baby, and Charles E. McLane, defendants in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at Washington, in the District of Columbia, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of California, wherein Edward H. Harris, Isaac H. Shimer, and Latitia Shimer are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error, mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this twelfth day of February, in the year of our Lord, one thousand eight hundred and seventy-six.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

Service of a copy of the foregoing citation acknowledged at San Francisco, this February 14, 1876.

S. M. WILSON,
Surviving Partner of Wilson & Crittenden.

(Indorsed:) Filed 12th Febr'y, 1876. L. S. B. Sawyer, cl'k, by J. F. O'Beirne, dep. cl'k.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States, for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between Edward H. Harris, Isaac H. Shimer and Latitia Shimer, plaintiffs in error, and John McGovern, Francis R. Baby and Charles E. McLane, defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of February, in the year of

our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 100.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Circuit.

Attest, &c.
[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

c The answer of the judges of the circuit court of the United States for the district of California:

The record and all proceedings of the plaint whereof mention is within made with all things touching the same, we certify, under the seal of our said court to the Supreme Court of the United States within mentioned at the day and place within contained in a certain schedule to this writ annexed as within we are commanded.

By the court.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsed:) United States Supreme Court. Edward H. Harris & al., as pl'ffs in error, vs. John McGovern et al., def't in error. Writ of error. Filed February 12, 1876. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

1 *Complaint.*

In the circuit court of the United States of America, in and for the district of California.

EDWARD H. HARRIS, ISAAC H. SHIMER AND Latitia Shimer, plaintiffs,
vs.
JOHN MCGOVERN AND FRANCIS R. BABY AND Charles E. McLane, defendants.

The plaintiffs complain of the above-named defendants, and for cause of action, state:

That the plaintiffs are citizens and residents of the State of Illinois, and the defendants are citizens and residents of the State of California.

That the plaintiffs, Isaac H. Shimer and Latitia Shimer are husband and wife, having intermarried before the commencement of this action.

That this action concerns the separate property of said plaintiffs, Edward H. Harris and said Latitia Shimer; that said Edward H.

2 Harris and Latitia Shimer, on the first day of January, A. D. 1870, were, and now are, possessed as owners in fee-simple, and lawfully entitled to the possession of all that certain lot of land situate in the city and county of San Francisco, State of California, bounded and described as follows: Commencing at the southwest corner of hundred vara lot number (21) twenty-one of the Lagoon survey in said city & county; thence running northwesterly along the westerly line of said lot number twenty-one, two hundred and seventy-five feet; thence at right angles southwesterly along the southerly line of lot number eighteen, two hundred and seventy-five feet; thence at right angles southeasterly along the easterly line of lot number seven, two hundred and seventy-five feet

to a street; thence at right angles northeasterly along said street, two hundred and seventy-five feet to the place of beginning: Being the lot of land known as hundred vara lot number (19) nineteen of the Lagoon survey. That being so possessed thereof, the defendants afterwards and before the commencement of this action unlawfully entered and ousted said plaintiffs therefrom against their will and title, and still withhold the possession thereof from plaintiffs to their damage of one thousand dollars.

3 Wherefore plaintiffs demand judgment against said defendants that they surrender to them the possession of said land and premises, and to pay to them the sum of one thousand dollars for the unlawfully withholding thereof, with the costs and disbursements of this action.

GEO. F. & W'M H. SHARP,
Att'ys for Pl'ffs, No. 529 Clay Street, San Francisco.

STATE OF CALIFORNIA,
City and County of San Francisco:

Samuel Osborn, of said city & county, being duly sworn, says: That he is the attorney in fact of said plaintiffs, who are non-residents and now absent from the State of California. That this deponent has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except those matters therein stated on his information or belief, and as to those matters he believes it to be true.

SAM'L OSBORNE.

Subscribed and sworn to this 14th day of January, 1870, before me.
GEO. E. WHITNEY,
Com. U. S. Cir. C't, District of California.

(Endorsed:) Filed 14 January, 1870. Geo. E. Whitney, clerk.

4 *Answer of John McGovern.*

In the circuit court of the United States of America in and for the district of California.

EDWARD H. HARRIS, ISAAC M. SHIMER, AND Latitia Shimer, plaintiffs,
vs.
JOHN MCGOVERN, FRANCIS R. BABY, AND Charles E. McLane, defendants.

John McGovern, one of the above-named defendants, for answer to the complaint in this action, denies each and all of the allegations of said complaint.

And for a further and separate answer to the complaint in this action, and a further and separate defense against the cause of action stated therein, the defendant, John McGovern, denies that said plaintiffs, Edward H. Harris and Latitia Shimer, or either of them, were or was on the 1st day of January, A. D. 1870, or at any other time, either possessed as owners in fee simple, or otherwise, or entitled to the pos-

5 session of the land described in said complaint, or of any part thereof, and denies that the defendants, or any of them, ever at any time ousted said plaintiffs therefrom to their damage one thousand dollars, or any other sum whatever.

And for a further and separate answer to the plaintiffs' complaint

in this action, and as a further and separate defence against the cause of action therein stated, this defendant, John McGovern, alleges that on and long prior to said 1st day of January, A. D. 1870, the defendants, Charles E. McLane and Francis R. Baby, as tenants in common, were and ever since have been and are seized in fee-simple of said land described in the complaint and lawfully entitled to the possession thereof; and that he, this defendant, is in possession of said land under them, and as their tenant, and has never at any time held any other possession nor any title or claim of title to said land.

And for a further and separate answer to the plaintiffs' complaint in this action, and as a further and separate defence against the cause of action therein stated, the defendant John McGovern alleges that neither

6 the said plaintiffs, or any or either of them, nor any ancestor, predecessor, or grantor of said plaintiffs, or of any or either of them, were or was seized or possessed of said land described in the complaint, or of any part thereof, at any time within five years next before the commencement of this action; that the defendants Charles E. McLane and Francis R. Baby, and those under and through whom they claim, have been in the occupation and possession of the whole of said land for more than five years next before the commencement of this action under a claim of title thereto, exclusive of any other right adversely to the plaintiffs, and each of them, and to all other persons, and that he, this defendant, holds and has held said premises only for and as the tenant of his said co-defendants, and not otherwise.

WILSON & CRITTENDEN,
Att'ys for John McGovern.

(Endorsed:)

Service of a copy of the within answer hereby admitted this 26th day of March, 1870.

G. F. & W'M H. SHARP,
Att'ys for Pl'ff.

Filed March 26, 1870.

GEO. E. WHITNEY, *Clerk.*

7 *Answer of C. E. McLane and F. R. Baby.*

In the circuit court of the United States of America in and for the dis- of California.

EDWARD H. HARRIS, ISAAC H. SHIMER, AND Latitia Shimer, plaintiffs,
vs.
JOHN MCGOVERN, FRANCIS R. BABY, AND Charles E. McLane, defendants.

The above-named defendants, Charles E. McLane and Francis R. Baby, for answer to the plaintiffs' complaint therein, deny each and all of the allegations of said complaint.

And for a further and separate answer to the complaint of the plaintiffs in the above-entitled action, and a further and separate defense against the cause of action stated therein, the above named defendants, Charles E. McLane and Francis R. Baby, deny that said plaintiffs, Edward H. Harris and Latitia Shimer, or either of them, were or was on

the first day of January, A. D. 1870, or at any other time, either
8 possessed as owners in fee simple or otherwise, or entitled to the possession of the land described in said complaint, or of any part thereof; and deny that the defendants, or any of them, ever at any time ousted said plaintiffs therefrom to their damage one thousand dollars, or any other sum whatever.

And for a further and separate answer to the complaint of the plaintiffs in the above-entitled action, and as a further and separate defense against the cause of action therein stated, the defendants, Charles E. McLane and Francis R. Baby, allege that on and long prior to said first day of January, A. D. 1870, they, these defendants, as tenants in common, were, and ever since have been, and are seized in fee simple of said land described in the complaint, and lawfully in possession thereof.

And for a further and separate answer to the complaint of the plaintiffs in the above-entitled action, and as a further and separate defense against the cause of action therein stated, the defendants, Charles E. McLane and Francis R. Baby, allege that neither the said plaintiffs or any of them, nor any ancestor, predecessor, or grantor of said plaintiffs, or of any or either of them, were or was seized or possessed of said
9 lot of land described in the complaint, nor of any part thereof, at any time within five years next before the commencement of th action; and that these defendants and those under and through whom they claim, have been in the actual, quiet, peaceable, notorious, continued, and exclusive possession and occupation of the whole of said land for more than five years next before the commencement of this action under a claim of title thereto, exclusive of any other right, and adversely to the plaintiffs, and each of them, and to all other persons.

WILSON & CRITTENDEN,
Attorneys for Charles E. McLane and Francis R. Baby.

(Endorsed:)

Service of a copy of the within answer hereby admitted this 26th day of March, 1870.

G. F. & W. H. SHARP,
Att'ys for Pl'ff.

Filed March 26th, 1870.

GEO. E. WHITNEY, *Clerk.*

10 *Findings.*

In the circuit court of the United States for the district of California ninth circuit.

EDWARD H. HARRIS ET AL., PLAINTIFFS,
v.
JOHN MCGOVERN ET AL., DEFENDANTS. } Findings.

A jury having been waived by a stipulation of the parties, in writing duly filed, this cause came on to be tried by the court without the intervention of a jury, on the twentieth, twenty-first, and twenty-second days of August, A. D. 1873, William H. Sharp, William Higby, and P. B. Ladd, esquires, appearing on behalf of plaintiffs, and W. W. Cope, esquire, on behalf of defendants, and after hearing the testimony and the arguments of counsel, the court being sufficiently advised, now finds the following facts and conclusions of law, viz:

FIRST.

The land in controversy in this action is known as one hundred
11 vara lot, number nineteen, of the Laguna survey, and is situated within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the fifteenth day of April, 1851; but said land lies west of Larkin street and northwest of Johnson street, as they existed prior to and at the time of the passage of certain ordinances by the common council of said city, which were afterwards ratified by an act of the legislature of said State entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11th, 1858. Said land is also within the boundaries designating the lands to which the right and title of the United States were relinquished and granted to said city and its successors by an act of the Congress of the United States entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864.

SECOND.

On the 25th day of September, 1848, T. M. Leavenworth was alcalde of the pueblo or town of San Francisco, which was subsequently
12 incorporated as the city of San Francisco, and on said day, as such alcalde, he made a grant in due form of the land in controversy to a party designated in said grant by the name of Stephen A. Harris, which grant was duly recorded in the official book of records of grants kept by said alcalde, and which book now constitutes a part of the records of the office of recorder of deeds of the city and county of San Francisco.

THIRD.

At the date of said grant there was residing at said pueblo or town of San Francisco a man named Stephen A. Harris, and another man named Stephen Harris. The said grant was intended for and delivered to said Stephen Harris, and not said Stephen A. Harris; and said Stephen Harris acquired, by virtue of said acts, all the title that passed or was conveyed by the said grant.

FOURTH.

The said Stephen Harris left California in 1850, and never returned. He went to New Jersey, where he remained several years, then removed to the State of Illinois, where he died on November 5th, 1867, leaving a will by which he devised his property, including the land in contro-
13 versy, to the plaintiffs, who are his legitimate children, and are also a portion of his heirs-at-law, and who at the time of the decease of said Stephen Harris were minors. Said will has been duly admitted to probate in the State of Illinois, but has never been presented to or admitted to probate by any probate or other court in the State of California.

FIFTH.

There was no evidence tending to show that said Stephen Harris or

said plaintiffs, or either of them, or any person claiming under them or any or either of them, ever improved said land or ever was in the actual possession or occupation of said land or of any part thereof.

SIXTH.

On May 1st, 1854, Stephen A. Harris, at San Francisco, by deed in due form and duly recorded, conveyed said land to one Blackstone. All the right, title, and interest thus acquired by said Blackstone, by sundry mesne conveyances in due form and duly recorded, became on June 22d, 1865, vested in said defendants for a valuable consideration
14 paid, and without notice of the claim of Stephen Harris or said plaintiffs, or either of them.

SEVENTH.

In the spring of 1864 one Jenkins, one of said grantors of defendants, took actual possession of said land, claiming title under one of said mesne conveyances from said Blackstone, fenced and occupied said lands, and he and his several grantees, down to and including said defendants, have since said spring of 1864 down to the present time been in the actual, peaceable, open, continuous, exclusive, and adverse possession of said land, claiming title thereto in good faith against all the world, under said several conveyances from Stephen A. Harris, Blackstone, and their grantees.

EIGHTH.

There was no evidence tending to show that any party was in the actual occupation or possession of said land or any part thereof on the first day of January, 1855, or at any time between that date and the first day of July, 1855.

NINTH.

15 The plaintiff Edward H. Harris attained his majority in March, 1869, and Letitia Harris Shimer, the other plaintiff, her majority in May, 1868. This action was commenced on January 14th, 1870.

CONCLUSIONS OF LAW.

I.

The adverse possession of the defendants' grantors having commenced in the spring of 1864, the statute of limitations began to run as early at least as July 1, 1864, the date of the act of Congress mentioned in the first finding of facts, at which time the title of the city of San Francisco to its municipal lands, situate within the boundaries of the charter of 1851, became perfect.

II.

The cause of action having accrued, and the statute of limitations having commenced to run during the lifetime of Stephen Harris, the running of the statute was not interrupted by his subsequent decease, and the descent of such right of action to the plaintiffs while minors and under a disability to sue.

III.

16 The defendants and their grantees having been in the continuous adverse possession of the lands for a period of more than five years subsequent to July 1, 1864, and before the commencement of this action, and there being no disability to sue when the cause of action first accrued, the action is barred.

IV.

That defendants are entitled to judgment with costs.
Let judgment be entered accordingly.
(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed 30th March, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

17 *Judgment.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

EDWARD H. HARRIS ET AL. *v.* JOHN M'GOVERN ET AL. } No. 855.

This cause having come on regularly for trial on the 20th day of August, A. D. 1873, being a day in the June term, A. D. 1873, of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties duly filed, William Higby, William H. Sharp, and P. B. Ladd, esq's, appearing on behalf of plaintiffs, and W. W. Cope, esq., on behalf of defendants, and the trial having been proceeded with on the 21st and 22d days of said August, and witnesses on behalf of the plaintiffs and of the defendants having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and the court after due deliberation having filed its finding in writing and ordered
18 that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the plaintiffs take nothing by this action; that the defendants go hereof without day, and that John McGovern, Francis R. Baby, and Charles E. McLane, defendants, do have and recover of and from Edward H. Harris, Isaac H. Shimer, and Latitia Shimer, plaintiffs, their (the said defendants), costs in this behalf expended, taxed at ninety-seven $\frac{70}{100}$ dollars.

Judgment entered the 30th day of March, A. D. 1874.
L. S. B. SAWYER, *Clerk.*

A true copy of an original judgment entered in the therein entitled cause in judgment register C L, No. 2, on page 34.
Attest, &c.
[SEAL] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Filed March 30th, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

19 *Certificate to judgment roll.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth judicial circuit, district of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the cause therein entitled.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 30th day of March, A. D. 1874.

[SEAL] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

(Endorsed:) Judgment roll. Filed March 30th, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

20 *Opinion.*

In the circuit court of the United States, ninth judicial circuit, for the district of California.

EDWARD H. HARRIS ET AL. }
vs. }
JOHN MCGOVERN ET AL. }

This is an action to recover one hundred vara lot No. 19, of the Laguna survey. This lot is within the charter lines of San Francisco, as defined in the act of incorporation of 1851. It lies west of Larkin street and northwest of Johnson street, and is within the limits covered by the Van Ness ordinance. On September 25, 1848, T. M. Leavenworth, as alcalde, issued a grant for this lot to a party designated in the grant by the name of Stephen A. Harris. At that time there was at San Francisco a man named Stephen A. Harris and another named Stephen Harris. In 1850, said Stephen Harris left California, and never returned. He went to New Jersey, where he resided for several years, then removed
21 to Illinois, where he died on November 5, 1867, leaving a will, in which he devised certain property, including said lot nineteen, to the plaintiffs, who are his children and his heirs-at-law, and who at his death were minors. On May 1, 1854, Stephen A. Harris, at San Francisco, by deed in due form conveyed said one hundred vara lot to one Blackstone. The defendants deraign title to said lot through said Blackstone, and they and their grantors have been in possession, claiming title adversely under said conveyance since the spring of 1864. It does not appear that any party was in the actual possession or occupation of said premises on January 1, 1855, or between that time and July, 1855. This action was commenced on January 14, 1870. The plaintiff, Edward H. Harris, attained his majority in March, 1869; and Latitia Harris Shimer, the other plaintiff, in May, 1868. The plaintiffs claim title as devisees, and as heirs of said Stephen Harris, who is claimed to be the real party designated in the grant by the name of Stephen A. Harris, and the party to whom the grant was actually made. The testimony tends strongly to show

this claim to be well founded, and for the purposes of this decision, I shall assume the grant to have been in fact made to said Stephen
22 Harris. Defendants set up the statute of limitations as one defense.

Stephen Harris was the party disseized, the adverse possession under a paper title, in all respects regular on its face, having commenced several years before his death. The statute of limitations of 1863 is the one applicable. (Statutes 1863, 325.) Under this statute the time limited began to run, at least from the date of the act of Congress of July 1, 1864, to settle land titles in California, at which time the title of the city of San Francisco to the municipal lands within the limits embraced by the Van Ness ordinance became final. (13 U. S. Stat. at Large, 333, sec. 5.)

In Montgomery v. Bevans, M'r Justice Field says: "Now, though the title of the city, as stated in the previous opinion, is Mexican in its origin, and was recognized and established by the decree of the circuit court of the United States, as modified by the act of Congress of March 8, 1866, yet all adverse interest of the government to the lands within the corporate limits of 1851, being released by the act of July 1, 1864, the titles conferred by the Van Ness ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done." (1 Sawyer Rep., 679.) As the titles derived
23 through the city thus became final, the title of the city itself must have become final, and the plaintiffs claim title through the city and the Van Ness ordinance.

The statute, therefore, began to run during the lifetime of Stephen Harris, and more than five years before the commencement of this action. The question under the statute then is, did the statute, having once commenced to run, continue to run notwithstanding the death of Harris and the vesting of the title and right of action in his minor children, or was the running of the statute suspended during the minority and consequent disability of the plaintiffs? In other words, is the case within the exception of the sixteenth section of the statute, allowing those who are under disability five years after the disability ceases within which to commence the action? Under all the English statutes it has long been settled that the exception only applies where the right of action first accrues during the disability; that when the statute once begins to run it continues to run, and overrides all disabilities of every kind subsequently arising. (Angel on Lim., sec. 477–479; Walden v. Heirs of Gratz, 1 Wheat., 296; Mercer's Lessees v. Seldon, 1 How., 37; Den v. Moore, 3 Wall., j'r, C. C., 292; Den v. Clark, 3 Green, N. J., 347; Stowell
24 v. Zouch, Plow., 353; Doe v. Jones, 4 Term R., 300.) The construction of the New York statute is settled in the same way. (Demorest v. Wynkoop, 3 John. Ch., 129; Fleming v. Griswold, 3 Hill, 85; Becker v. Von Valkenburg, 29 Barb., 324–5.)

But counsel for plaintiffs insist that the statute of California is different from the English and New York statutes, and that the decisions under those statutes, consequently, have no application. In this they are mistaken. Section sixteen of the statute of California, as amended in 1863, so far as it touches this question, is an exact transcript of section sixteen of the statute of New York, from which it was taken. It is as follows:

"If the person entitled to commence any action for the recovery of real property * * * * be at the time, such title shall first descend or accrue, either: First, within the age of majority," etc. (Stat. 1863, 326. The language of the statute of New York is: "If any person, en-

titled to commence any action in this article specified * * * be at the time, such title shall first descend or accrue, either," etc. (Angel on Lim., app. LXII, sec. 16.) It will be seen that the language is identical. The language itself is clear, independent of authority; it is, if
25 any person "entitled" to commence an action be at the time, "such title"—that is, such title, or right to commence the action, referring to the word "entitled," in the language of the first part of the clause—"shall first descend or accrue." It only excepts the case when the right or title to commence the action "first descends," or "first accrues." It excepts only once, and that "the first." Now, in this case, the right or title to commence the action "first accrued" to Harris, the ancestor, and not to the plaintiffs. So, also, our statute is substantially a transcript of the English statute of 21 James I, which reads: "If any person * * * that is or shall be entitled to such writ (that is, to commence such action), * * * or that hath or shall have such right or title of entry, be or shall be at the time of said right or title first descended, accrued, come or fallen within the age of twenty-one," etc. (Ang. on Lim., sec. 477–9, and Appendix IV, sec. II.) The language in all these statutes is substantially identical, and must receive the same construction. The construction had long been thoroughly settled by judicial decisions when this provision was adopted in this State, and such construction must be presumed to have been adopted with the
26 language. Besides, I think the construction correct.

It is further insisted that the defendants had not, personally, been in possession during the entire statutory periods, and that they cannot connect their possession with the possession of their grantors, in order to make up the full term. There is nothing in this point. Harris was disseized under a claim of title as early as 1864, and the disseizors transferred the possession acquired by them with their title to their grantees. The possession of the defendants is the same as that of their grantors—the possession and the interest were continuous. This principle has been long and repeatedly recognized by the courts of California. (San Francisco v. Fulde, 37 Cal., 349.) The conclusion attained renders it unnecessary to consider the other interesting points made by defendants. It results that the bar of the statute attached before the commencement of this action, and the defendants are entitled to judgment and costs.

Let judgment be entered accordingly.

January 26, 1874.

(Endorsed:) Read January 26, 1874. L. S. B. Sawyer, clerk.

27 *Bond on appeal.*

In the Supreme court of the United States of America.

EDWARD H. HARRIS, ISAAC H. SHIMER, AND Latitia Shimer, plaintiffs in error,
vs.
JOHN MCGOVERN, FRANCIS R. BABY, AND Charles E. McLane, defendants in error.

Know all men by these presents that we, Albert E. Crane, of the city and county of San Francisco, California, and Carmi Reynolds of the city and county of San Francisco, State of California, are held and firmly bound unto John McGovern, Francis R. Baby and Charles E.

McLane, in the sum of five hundred ($500) dollars lawful money of the United States of America, to be paid to the said John McGovern, Francis R. Baby and Charles E. McLane, their executors or administrators, to which payment well and truly to be made, we bind ourselves
28 and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 6th day of January, A. D. 1876.

Whereas Edward H. Harris, Isaac H. Shimer and Latitia Shimer, have prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above entitled action by the circuit court of the United States of America for the district of California:

Now, therefore, the condition of this obligation is such that if the above-named Edward H. Harris, Isaac H. Shimer and Latitia Shimer, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

ALBERT E. CRANE. [SEAL.]
CARMI REYNOLDS. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

29 UNITED STATES OF AMERICA,
District of California :

Albert E. Crane and Carmi Reynolds, being duly sworn, each for himself and not for the other, deposes and says that he is a freeholder in said district and is worth the sum of five hundred ($500) dollars lawful money of the United States of America, exclusive of property exempt from execution and over and above his just debts and liabilities.

ALBERT E. CRANE.
CARMI REYNOLDS.

Subscribed and sworn to before me this 6th day of January, A. D. 1876.

JOS. F. O'BEIRNE,
Commissioner of U. S. Circuit Court, District of California.

(Endorsed:) I approve both the form of the within bond and the sufficiency of the sureties thereon.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge.

Filed January 10th, 1876.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

30 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing and hereunto twenty-nine written pages, numbered from 1 to 29, both inclusive, are a true copy of the record and of all proceedings in the therein entitled action, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this twelfth day of February, in the year one thousand eight hundred and seventy-six.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Dep. Clerk.

31 In the Supreme Court of the United States.

EDWARD H. HARRIS ET AL. }
v. }
JOHN MCGOVERN ET AL. }

It is hereby stipulated that the property the title to which is in controversy in the above entitled action was at the commencement of said suit and now is of the value of more than five thousand dollars, said property being one hundred vara lot No. 19, in the Lagoon survey in the city and county of San Francisco, State of California.

Sept. 18, 1876.

S. M. WILSON,
Att'y for Def'd'ts.
D. W'M DOUTHITT,
Counsel for Pl'ffs and Appellants.

U. S. OF AMERICA,
DISTRICT & STATE OF CALIFORNIA,
City & County of San Francisco, ss:

H. A. Cobb, being first duly sworn, says he is and for more than ten years last past has been a dealer in real estate in the city and county of San Francisco, and is thoroughly acquainted with the present
32 and past values thereof; that 100 vara lot No. 19, in the Lagoon survey in said city and county of San Francisco, was in 1870, and ever since has been and is now, of the value of more than five thousand dollars.

H. A. COBB.

Subscribed & sworn to before me this 18 day of September, A. D. 1876, in witness whereof I have hereunto set my hand and notarial seal.

[SEAL.] HOLLAND SMITH,
Notary Public.

(Indorsed:) In the Supreme Court of the United States. Edward H. Harris et al. vs. John McGovern et al. Stipulation and affidavit of value.

Sup. Court U. S., 1876, Octo. term. No. 723. Edward Harris, Isaac H. Shimer, Latitia Shimer, pl'ff err'r, vs. John McGovern, Francis R. Baby, & Charles E. McLane. Stipulation as to value. Filed 29 September, 1876.

(Indorsement on cover:) No. 168. Edward Harris, Isaac H. Shimer, Latitia Shimer, plaintiffs in error, vs. John McGovern, Francis R. Baby & Charles E. McLane. California C. C. U. S. Filed 29th September, 1876.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES

NO. 168.

EDWARD HARRIS, ISAAC H. SHIMER, LATITIA SHIMER, PLAINTIFFS IN ERROR,

vs.

JOHN McGOVERN, FRANCIS R. BABY, AND CHARLES E. McLANE, DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

D. WM. DOUTHITT,
Of Counsel for Plaintiff in Error.

NO. 168.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1878.

EDWARD HARRIS, ET AL., PLAINTIFFS IN ERROR,

VS.

JOHN McGOVERN, ET AL., DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of Case.

The action is ejectment to recover one hundred vara lot number nineteen (19) of the Lagoon survey, in the City and County of San Francisco. (Complaint on page 2 of the transcript.)

Defendant McGovern files a separate answer, consisting, 1st, of the general issue; 2d, a denial of the title and possession of plaintiffs antecedent to the time of bringing suit; 3d, a plea of title in defendants; 4, the Statute of Limitations. (Transcript pp. 3 and 4.)

Defendants McLane and Baby also answer, setting up the same defenses. (Transcript pp. 4 and 5.)

Complaint was filed January 14th, 1870. (Tr. p. 3.)

The case was tried before the Court August 20th, 21st, and 22d, 1873. (Tr. p. 5). Findings filed and judgment entered thereon for defendants, March 30th, 1874. (Tr. pp. 8 and 9.)

Writ of error sued out February 12th, 1876, (Tr. p. 1), and record filed in Supreme Court, September 29th, 1876.

The counsel stipulate that the value of the property has at all times since the commencement of the action been over $5,000, and an affidavit is filed in this Court to the same effect. (Tr. p. 13.)

The case comes up on the judgment roll from which the facts appear as detailed in the findings of the Court below on pp. 6 and 7 of the transcript.

The Court below also files an opinion, returned in the transcript, (p. 9); but we do not assail the opinion, and it is unneeessary to advert to it.

All errors assigned by plaintiffs in error arise on the judgment roll.

The only errors assigned are that the findings of the Court do not support its conclusions of law or its judgment.

The only question involved which we propose to raise is as to the time when the Statute of Limitations commenced to run as to property in San Francisco, situated as is situated the property in controversy.

Assignment of Errors.

The Court erred in its first conclusion of law from its findings; to-wit: that as to the property in controversy, the Statute of Limitations began to run as early as July 1st, 1864, (Tr. p. 7), and in its third conclusion of law, that defendants, having been in possession for five years and upwards, subsequent to July 1st, 1864, the action is barred, and in the fourth conclusion of law that defendants were entitled to judgment.

Argument.

The opinion of the Court (Tr. p. 9) does not at all refer to the only question we propose to discuss on this record.

We invite the attention of the Court to one point only, to-wit.: That, under the facts found by the Court, the Statute of Limitations did not commence to run earlier than March 8th, 1866.

The property in controversy is within the corporate limits of San Francisco as defined by the Charter of 1851, but is west of Larkin street, and northwest of Johnson street. It is also within the boundaries covered by the Act of Congress of July 1st, 1864, entitled "An Act to expedite the settlement of titles to lands in the State of California." (Tr. p. 6, finding first,) U. S. Statutes, 1863–4, p. 332.

The Court below held as a matter of law that the Statute of Limitations commenced to run at the passage of said Act of Congress, and therein we think the Court erred.

The Statutes of Limitation of California pertinent t the case are as follows:

"No action for the recovery of real property, or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within five years before the commencement of such action."

Amendment to Section 6 of Act defining the time for commencing civil actions. (Statutes of 1863, p. 325; 2 Hittell's Digest, sec. 4348.)

"No cause of action or defense to an action founded upon the title to real property, or to rents or profits out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within five years before the commencement of the act in

respect to which such action is prosecuted or defense made. (Section 7 of same Act; Statutes of 1863, p. 325; 2 Hittell's Digest, sec. 4349.

The plaintiffs claim title under grant from the Pueblo of San Francisco, under date of September 25, 1848.

Finding second. Page 6.

The sole claim of the defendants recognized by the Court below, is the Statute of Limitations.

The Pueblo of San Francisco held its lands under a Mexican grant. (Hart v. Burnett, 15 Cal., 537.) And the Statute of Limitations did not begin to run against grantees under the city until final confirmation of that grant, or cession of the lands by the United States. (Montgomery v. Bevans, 1 Sawyer, 680-681.) Both these propositions are assumed to be correct by the Court below and, indeed, its decision is based on them. (See opinion in Transcript, pp. 9, 10, and 11.)

But it is held by the Court that the Act of Congress of July 1st, 1864, to settle land titles in California, (13 U. S. Statutes at Large, 333,) was a grant of these lands to the City, and the opinion of the Court is avowedly based on the decision of Mr. Justice Field in the case of Montgomery v. Bevans, above cited

The text of that decision will bear the construction put upon it by the Court below, but it is a familiar rule of construction that a judicial opinion must be viewed in connection with the facts that gave rise to it, and must be interpreted in the light of those facts

We believe the final decision of the Court in Montgomery v. Bevans to have been a correct solution of the questions arising *in that case*, but in that case the location of the property in controversy was very different from that of the property in dispute in the case at bar. In Montgomery v. Bevans the property in controversy was fifty vara lot No. 113, which is in the block bounded by Broadway, Powell, Pacific and Stockton streets, and is in that portion of the city lying east of Larkin and northeast of Johnson streets.

It is specially found by the Court that the property in controversy herein lies *west* of Larkin street and *northwest* of Johnson street, (finding first, p. 6), and that there was no actual possession of the property on the 1st day of January, 1855, or at any time between that date and the first day of July, 1855, (finding eighth, page 7).

The significance of these facts will be made apparent by an examination of the Act of Congress of July 1, 1864, in connection with the Van Ness Ordinance.

Section 5 of the Act of Congress relinquishes and grants to the city of San Francisco all the right and title of the United States, to all lands in said city within its charter line of 1851, "*for the uses and purposes specified in the ordinances of said city, ratified by an Act of the Legislature of the said State, approved on the eleventh of March, 1858, entitled 'An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city.'*"

The Act referred to is what is known in California as the "Van Ness Ordinance," and will be found in the laws of California for 1858, page 52; and also in 2 Hittell's Digest, sec. 6815, et seq. It attempts to dispose of certain classes of lands in the city, as follows:

Section 2 of the Ordinance reads

"The City of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the ac-

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES

NO. 168.

EDWARD HARRIS, ISAAC H. SHIMER, LATITIA SHIMER, PLAINTIFFS IN ERROR,

vs.

JOHN McGOVERN, FRANCIS R. BABY, AND CHARLES E. McLANE, DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

S. M. WILSON,
Of Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES

NO. 168.

EDWARD HARRIS, ET AL., PLAINTIFFS IN ERROR,

VS.

JOHN McGOVERN, ET AL., DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

This is an action of ejectment to recover possession of a lot in the City and County of San Francisco. The plaintiffs in error were the plaintiffs in the Court below. The pleadings are in the form prescribed by the rules of the Court adopting the State practice. The issues presented are as to the title and right of possession of the plaintiffs, and the Statute of Limitations. The facts are concisely stated in the findings.

The lot in controversy is situated within the corporate limits of the City of San Francisco as defined by an Act of the Legislature passed on the 15th day of April, 1851, but lies west of Larkin street and northwest of Johnson Street as they existed prior to and at the time of the passage of certain ordinances by the Common Council in relation to the lands of the City, which were afterwards ratified by the Legislature.

Rec., fol. 11.
Statutes of California, 1858, *p.* 52.

The first of these ordinances—commonly known as the Van Ness Ordinance—was passed on the 20th day of June, 1855, and purports to relinquish and grant all the right and claim of the City to the lands within the corporate limits—with certain exceptions and reservations—to the parties in the actual possession thereof on the 1st day of January, 1855, and continuously thereafter until the introduction of the Ordinance in the Common Council.

The Ordinance provides, however, that all persons holding title to lands within such limits by virtue of a grant made by any Ayuntamiento, Town Council, Alcalde, or Justice of the Peace of the former Pueblo of San Francisco before the 7th day of July, 1846; or grants

to lots of land lying east of Larkin street and northeast of Johnson street, made by any Ayuntamiento, Town Council, or Alcalde of said Pueblo, since that date and before the incorporation of the City of San Francisco; * * shall be deemed the possessors of the land so granted for all the purposes of the Ordinance.

By an Act of Congress passed on the 1st day of July, 1864, the right and title of the United States to the lands within the corporate limits of the City as established in 1851, were relinquished and granted to the City and its successors for the uses and purposes specified in the ordinances above referred to—subject to certain exceptions expressed in the Act.

13 *Statutes at Large*, 333, *Sec.* 5.

The plaintiffs claim title as devisees and heirs of one Stephen Harris, deceased, by virtue of a grant made on the 25th day of September, 1848, by T. M. Leavenworth, Alcalde of the Pueblo or town of San Francisco. The grant was made to a person therein designated as Stephen A. Harris, who then resided at San Francisco, but the Court finds that the grant was intended for and delivered to Stephen Harris and not Stephen A. Harris, and that the former acquired whatever title was conveyed by the grant. Stephen Harris died on the 5th day of November, 1867, and the plaintiffs were minors at the time of his death.

The Court states in its findings that there was no evidence of any actual possession or occupation of the lot by Stephen Harris or the plaintiffs, or that any person was in the actual possession thereof on the 1st day of January, 1855, or at any time between that date and the 1st day of July, 1855.

The defendants claim under Stephen A. Harris by regular mesne conveyances duly recorded, and the Court finds that the defendants and their grantors have been in the adverse possession of the lot since the Spring of 1864. The action was commenced on the 14th day of January, 1870, the period of limitation prescribed by the statute being five years.

Statutes of California, 1863, *p.* 325, *Secs.* 1, 4.
See also Statutes of 1850, *p.* 343, *Sec.* 9.

The Court below based its decision exclusively on the statute of limitations, and we submit that the judgment is correct not only on that ground, but on the further ground that the plaintiffs have no title.

I.

In regard to the statute, it is admitted by the counsel for the plaintiffs that the decision below was right, unless the Court erred as to the time at which the statute commenced to run. The opinion of the Court is contained in the record, and we beg leave to refer to it as a part of our argument. The Court held that the statute commenced to run on the 1st day of July, 1864, the date of the passage of the

Act of Congress. Stephen Harris, the original grantee, was then living, and the defendants were in possession holding adversely.

In *Montgomery* vs. *Bevans*, 1 Sawyer, 653, a similar question arose and was decided the same way. We think that case is directly in point, though it would seem from the opinion that the question there related to a grant which had been confirmed by the Van Ness Ordinance. The grant here is not within the confirmatory provisions of that Ordinance, and this fact is relied on as distinguishing the cases. But we are unable to perceive any distinction favorable to the plaintiffs.

Prior to the passage of the Act of Congress, the legal title was in the United States, the City having merely an equitable right as the successor of the Pueblo.

Townsend vs. *Greely*, 5, *Wall.* 336.
Alexander vs. *Roulet*, 13, *Wall.* 386.

The Act vested the legal title in the City, and the union of the legal and equitable estate made a perfect title. As between the United States and the City, the whole matter was disposed of by the Act; and whether we regard the Act as confirmatory of the Pueblo title, or as conveying an independent title, the result is the same. Congress had full power to deal with the subject as it pleased, and having acted upon it and vested the title in the City on such terms as it deemed proper, its action is final and conclusive. The subsequent confirmation of the claim presented by the City does not affect the question. The title acquired under the Act was neither enlarged nor contracted by reason of the confirmation. As to all the lands within the limits designated in the Act, and not excepted from its provisions, the Act must be looked to as the source of title, and its effect was to intercept the proceedings on the part of the City, and withdraw the claim from the further consideration of the Courts.

Grisar vs. *McDowell*, 6 *Wall.* 363.

The land in controversy in the case cited, though within the corporate limits of 1851, was expressly excepted from the provisions of the Act, and the decision proceeded upon the decree of confirmation as modified by the Act of 1866. But the principal involved here was distinctly laid down, and the reasoning of the Court is decisive as to the effect of the previous Act.

But there is nothing in the findings as to the claim of the City or the proceedings in that behalf. We have alluded to these proceedings because they furnish the staple of the argument on the other side, but in the absence of findings on the subject, the Court cannot notice them. So far as the title is concerned, the Act alone can be considered; and the view we have taken of the Act is not changed by the circumstance that the grant to the City is expressed to be for the uses and purposes specified in the Van Ness Ordinance. This language was not intended to limit the extent of the grant, but to

protect the beneficiaries of the City under the Ordinance. Some of the lands were reserved by the Ordinance for public use, and the construction of the Act suggested by the counsel for the plaintiffs would make the title of the City to these lands depend upon the continuance of the use. In other words, the Act would operate *pro tanto* as a grant for certain specific public uses, a discontinuance of which would forfeit the title of the City, and the lands would revert to the United States. This is neither the theory nor the practical effect of the Act. The intention was to vest in the City the title to all the lands within the prescribed limits—less the excepted portions—subject only to the rights of grantees under the Ordinance. Besides, the findings do not show that the lot in controversy was unoccupied at the time required to secure the benefit of the Ordinance. They merely show that no evidence on the subject was produced at the trial. If the rights of the plaintiffs are dependent in any degree upon the fact as to whether the lot was occupied or not, it was incumbent on them to produce the evidence and establish the fact. If the lot was unoccupied at the time fixed by the Ordinance, the consequence is that no person can rely upon the Ordinance in making out a title to it; but as the case now stands, the question cannot be determined by the Court. It is impossible to say from the findings whether the lot is within the operation of the granting clause contained in the Ordinance or not. For aught that appears to the contrary, it may be, and if it is, the title of the grantee under the Ordinance has been confirmed by the Act. This is all that can be said on the subject, and there is no ground for an inference either way.

Having given our views of the Act and its effect in passing the title to the City, the only remaining inquiry is as to the position of the plaintiffs. We have already stated what their title is, and apart from the statute of limitations, we submit that their right to recover depends upon whether the title vested in the City by the Act of Congress inured to the benefit of Stephen Harris as the holder of the grant. This conclusion cannot be avoided if we are correct as to the operation and effect of the Act; and if the title inured to his benefit, he took the place of the City, and succeeded to the title immediately upon the passage of the Act. The title being perfected in the City and inuring to his benefit, the statute commenced to run, and having once commenced it continued to run notwithstanding his death. The case is cleary within the principle of *Montgomery* vs. *Bevans*, and the distinction attempted is wholly unfounded.

II.

Our next point is that on the facts set forth in the findings the plaintiffs have no title. They rely on an unconfirmed grant made by an American Alcalde after the acquisition of the country by the United States. The grant has not only never been confirmed, but it is one of a class of grants expressly repudiated by the

Van Ness Ordinance and the Act of Congress. All grants made since the conquest, except those east of Larkin street and northeast of Johnson street, were excluded from the provisions of the Ordinance, and in relinquishing to the city the title of the United States for the uses and purposes specified in the Ordinance, Congress determined what grants should be respected; and having full control of the subject, its determination is final. The title asserted by the plaintiffs under the grant in question is independent of and directly repugnant to the Act of Congress.

But without extending the argument, we refer the Court to *Alexander* vs. *Roulet*, above cited. It was there held that a Prefect grant, conceding the authority of the person who made it, and the sufficiency of the grant to pass whatever title the Pueblo had, only created an equity in the grantee, and was void for want of confirmation. It is unnecessary to repeat the reasoning on which the Court based its conclusion. The opinion shows that the question was carefully examined, and the principle laid down is equally applicable here.

There is another objection to the title, however, which may be stated in a few words.

The grant was made to Stephen A. Harris, and there was such a person then residing at San Francisco. These facts being found, their effect was not overcome by the further finding that the grant was intended for and delivered to Stephen Harris; and the additional statement that he aquired whatever title was conveyed by the grant is merely the conclusion of the Court deduced from the fact of the intention and delivery. But the grant speaks for itself, and there being no ambiguity as to the grantee, it is a legal impossibility to substitute another person in his place, and thus give a direction to the title contrary to the terms of the grant.

Jackson vs. *Hart*, 12, *Johns.* 76.
Jackson vs. *Bourham*, 15, *Johns.* 226.
Crawford vs. *Spencer*, 8, *Cush.* 418.
Peabody vs. *Brown*, 10, *Gray* 45.
Grant vs. *Naylor*, 4 *Wheat.* 224.

We submit that the judgment should be affirmed.

S. M. WILSON,
Counsel for defendants in error.